# Chapter 9: Pretrial Proceedings

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**In this chapter. . .**

This chapter briefly discusses several issues that arise following a preliminary inquiry or preliminary hearing. The court may schedule a pretrial conference to isolate contested issues in a case and to set discovery, motion, and plea deadlines. Sections 9.4 and 9.5 discuss issues that arise when a trial will be held.

## 9.1 Pretrial Conferences

MCR 3.922(D) allows the court to direct the parties to appear at a pretrial conference to settle all pretrial matters. Except as otherwise provided in or unless inconsistent with the rules of Subchapter 3.900, the scope and effect of a pretrial conference are governed by MCR 2.401.

A pretrial conference may be held at any time after the commencement of the action. The court must give reasonable notice of the scheduling of the conference. MCR 2.401(A).

## 9.2 Discovery

**Materials discoverable as of right.** MCR 3.922(A)(1) lists materials that are discoverable as of right. MCR 3.922(A)(1)(a)–(h) state:

> "(1) The following materials are discoverable as of right in all proceedings provided they are requested no later than 21 days before trial unless the interests of justice otherwise dictate:
>
> > (a) all written or recorded statements and notes of statements made by the juvenile or respondent that are in possession or control of petitioner or a law enforcement agency, including oral statements if they have been reduced to writing;

> (b) all written or recorded nonconfidential statements made by any person with knowledge of the events in possession or control of petitioner or a law enforcement agency, including police reports;
>
> (c) the names of prospective witnesses;
>
> (d) a list of all prospective exhibits;
>
> (e) a list of all physical or tangible objects that are prospective evidence that are in the possession or control of petitioner or a law enforcement agency;
>
> (f) the results of all scientific, medical, or other expert tests or experiments, including the reports or findings of all experts, which are relevant to the subject matter of the petition;
>
> (g) the results of any lineups or showups, including written reports or lineup sheets; and
>
> (h) all search warrants issued in connection with the matter, including applications for such warrants, affidavits, and returns or inventories."

**Materials discoverable by motion.** MCR 3.922(A)(2) states as follows:

> "On motion of a party, the court may permit discovery of any other materials and evidence, including untimely requested materials and evidence that would have been discoverable of right under subrule (A)(1) if timely requested. Absent manifest injustice, no motion for discovery will be granted unless the moving party has requested and has not been provided the materials or evidence sought through an order of discovery."*

*See also MCR 3.923(A)(3), which allows the court to serve process on additional witnesses and order production of additional evidence. This rule is discussed in Section 12.10.

"Depositions may only be taken as authorized by the court." MCR 3.922(A)(3). The Court of Appeals has held that the trial court may not allow the attorney for the respondent-parent to interview or depose the child under the predecessor to this rule. *In re Lemmer,* 191 Mich App 253 (1991). The Court construed the term "other materials" in the court rule to include only tangible items or items within the knowledge of the petitioner similar to those items that are discoverable by right listed in former MCR 5.922(A)(1). *Lemmer, supra* at 256. Note, however, that former MCR 5.922(A)(2) was amended subsequent to the decision in *Lemmer* to allow discovery of "other materials *and evidence"* upon motion of a party (emphasis added).

A lawyer-guardian ad litem's case file is not discoverable. MCL 712A.17d(3).

**Sanctions.** MCR 3.922(A)(4) provides that a failure to comply with MCR 3.922(A)(1) or (2) may result in sanctions set forth in MCR 2.313.

## 9.3 Motion Practice

Motion practice is governed by MCR 2.119. MCR 3.922(C).

In civil cases, MCR 2.116(C)(10) allows a court to grant a motion for summary disposition when "there is no genuine issue as to any material fact . . . ." This rule does not apply to child protective proceedings. *In re PAP,* 247 Mich App 148, 154–55 (2001). In *PAP,* the Court of Appeals rejected DHS's argument on appeal that because MCR 2.116(G) provides that MCR 2.119 applies to summary disposition motions, and MCR 2.119 applies to child protective proceedings, MCR 2.116 must apply to child protective proceedings. *PAP, supra* at 155. The Court of Appeals termed DHS's logic "specious" and concluded that the argument was "simply without merit."

**Time requirements for written motions under MCR 2.119.** Unless the court sets a different time period, written motions must be filed at least seven days before the hearing on the motion, and any response must be filed at least three days before the hearing. MCR 2.119(C)(4). Unless a different period is provided by rule or set by the court for good cause, written motions and accompanying papers (other than ex-parte motions) must be served on the opposing party at least nine days before the time set for hearing if service is by mail. MCR 2.119(C)(1)(a). Service by mail is complete at the time of mailing. MCR 2.107(C)(3). If service is by delivery as defined in MCR 2.107(C)(1) and (2), the motion must be served on the opposing party at least seven days before the time set for hearing. MCR 2.119(C)(1)(b).

Unless a different period is provided by rule or set by the court for good cause, any response to a motion must be served at least five days before the hearing if service is by mail, or at least three days before the hearing if service is by delivery. MCR 2.119(C)(2)(a)–(b).

If the court sets a different time period for serving a motion or response, the court's authorization must be in writing on the notice of hearing or in a separate order. MCR 2.119(C)(3).

**Required form of written motions.** Unless made during a hearing or trial, a motion must be in writing, must state with particularity the grounds and authority on which it is based, must state the relief or order sought, and must be signed by the attorney or party filing the motion. MCR 2.119(A).

A court may, in its discretion, dispense with or limit oral arguments on motions and may require the parties to file briefs in support of and in

opposition to a contested motion. MCR 2.119(E)(3). MCR 2.119(A)(2) requires a motion or response that presents an issue of law to be accompanied by a brief citing the authority on which it is based.

*Many jurisdictions have local court rules governing the form of motions.

The formal requirements of motions and accompanying briefs are contained in MCR 2.119(A)(2).* That rule states, in part:

> "Except as permitted by the court, the combined length of any motion and brief, or of a response and brief, may not exceed 20 pages double spaced, exclusive of attachments and exhibits. Quotations and footnotes may be single-spaced. At least one-inch margins must be used, and printing shall not be smaller than 12-point type. A copy of a motion or response (including brief) filed under this rule must be provided by counsel to the office of the judge hearing the motion. The judge's copy must be clearly marked JUDGE'S COPY on the cover sheet; that notation may be handwritten."

Permission to file a motion and brief in excess of the 20-page limit should be requested sufficiently in advance of the hearing on the motion to allow the opposing party adequate opportunity for analysis and response. *People v Leonard,* 224 Mich App 569, 578–79 (1997).

**Requirements for supporting affidavits.** Unless specifically required by rule or statute, a pretrial motion need not be verified or accompanied by an affidavit. MCR 2.114(B)(1). However, when a motion is based on facts not appearing on the record, the trial court has discretion to require affidavits. MCR 2.119(E)(2). Affidavits must conform to the requirements of MCR 2.113(A) (an affidavit must be verified by oath or affirmation) and MCR 2.119(B). Pursuant to MCR 2.119(B)(1), an affidavit filed in support of or in opposition to a motion must:

> "(a) be made on personal knowledge;
>
> "(b) state with particularity facts admissible as evidence establishing or denying the grounds stated in the motion; and
>
> "(c) show affirmatively that the affiant, if sworn as a witness, can testify competently to the facts stated in the affidavit."

Affidavits must be served on the opposing party within the time limits for written motions. See *Hubka v Pennfield Twp,* 197 Mich App 117, 119 (1992), rev'd on other grounds 443 Mich 864 (1993) (trial court erred by relying on an affidavit produced on the day of the hearing).

**When evidentiary hearings must be conducted.** A judge or referee need not hold an evidentiary hearing if no factual dispute exists. *Bielawski v Bielawski,* 137 Mich App 587, 592 (1984) (trial court should first determine whether contested factual questions exist before conducting an evidentiary hearing in a child custody case). In *People v Reynolds,* 93 Mich App 516, 519 (1979), and *People v Johnson,* 202 Mich App 281, 285–87 (1993), the Court of Appeals concluded that an evidentiary hearing must be conducted whenever a criminal defendant challenges the admissibility of evidence on constitutional grounds *and* there is any factual dispute regarding the issue.

The parties have the right to a judge at an evidentiary hearing. See MCR 3.912(B) (parties have the right to a judge at a hearing on the formal calendar) and MCR 3.903(A)(10) ("formal calendar" means judicial proceedings other than a delinquency proceeding on the consent calendar, a preliminary inquiry, or preliminary hearing).

**Motions for rehearing or reconsideration.** Except as provided in MCR 2.604(A), a motion for rehearing or reconsideration of the decision on a motion must be filed and served within 14 days of the entry of the order disposing of the motion. MCR 2.119(F)(1). Under MCR 2.604(A), an order is "subject to revision before entry of final judgment." "[T]he 14-day time limit on motions for reconsideration contained in MCR 2.119(F)(1) should not deter a trial court from correcting its interim orders whenever legally appropriate." Dean & Longhofer, Michigan Court Rules Practice (4th ed), §2604.2, p 351. No response to the motion may be filed and no oral argument is allowed unless the court directs otherwise. MCR 2.119(F)(2). The standard for granting or denying motions for rehearing or reconsideration is set forth in MCR 2.119(F)(3), which states as follows:

> "Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error."

In *People v Turner,* 181 Mich App 680, 683 (1989), the Court of Appeals stated that the rehearing procedure contained in MCR 2.119(F) "allows a court to correct mistakes which would otherwise be subject to correction on appeal, though at much greater expense to the parties."

## 9.4 Motions to Close Proceedings to the Public

*Such a motion may be made at trial; it need not be made before trial.

MCL 3.925(A)(1) provides that, as a general rule, all juvenile court proceedings on the formal calendar and all preliminary hearings shall be open to the public. However, MCL 712A.17(7) and MCR 3.925(A)(2) allow the court to close proceedings to the general public under limited circumstances. The court, on motion of a party or a victim,* may close proceedings to the general public during the testimony of a juvenile witness or a victim to protect the welfare of the juvenile witness or victim. In making such a decision, the court must consider:

- the age and maturity of the juvenile witness or the victim;
- the nature of the proceedings; and
- the desire of the juvenile witness, of the juvenile witness' family or guardian or legal custodian, or of the victim to have the testimony taken in a room closed to the public.

*See Section 22.2 for the criteria to determine who has "a legitimate interest."

If a hearing is closed under MCL 712A.17(7), the records of that hearing shall only be open by order of the court to persons having a legitimate interest. MCL 712A.28(2).*

## 9.5 Demand for Jury Trial or Trial by Judge

**Right to jury trial.** MCR 3.911(A) states that "[t]he right to a jury in a juvenile proceeding exists only at the trial."

**Right to jury trial where jurisdiction over a child has already been established.** Once jurisdiction over a child has been established through one parent's plea or at a trial of allegations against one parent, another parent has no right to demand a jury trial of allegations against him or her. Once jurisdiction over a child has been established, the jury has no further function and a court may proceed to the dispositional phase of the proceedings. *In re CR,* 250 Mich App 185, 205 (2002).

**Demand or waiver of trial by jury.** MCR 3.911(B) provides that a party may demand a jury trial by filing a written demand with the court. The demand must be filed within 14 days after the court gives notice of the right to a jury trial or 14 days after an appearance by an attorney or lawyer-guardian ad litem, whichever is later. The demand must be filed no later than 21 days before trial, but the court may excuse a late filing in the interest of justice. *Id.* MCL 712A.17(2) allows an interested person to demand a jury trial, or the court, on its own motion, to order a jury trial.

**Demand for a judge to preside at a hearing.** Parties have a right to a judge at a hearing on the formal calendar. MCR 3.912(B). MCR 3.903(A)(10) defines "formal calendar" as judicial proceedings other than a delinquency proceeding on the consent calendar, a preliminary inquiry, or a preliminary

hearing. A judge must preside at a jury trial. MCR 3.912(A)(1). The right to have a judge sit as factfinder is not absolute, however. A party who fails to make a timely demand for a judge to serve as factfinder at a bench trial may find that a referee will conduct all further proceedings, and that the right to demand a judge has been waived.

MCR 3.912(B) states that a party may demand that a judge rather than a referee serve as factfinder at a nonjury trial by filing a written demand with the court. The demand must be filed within 14 days after the court has given the parties notice of their right to have a judge preside, or 14 days after an appearance by an attorney or lawyer-guardian ad litem, whichever is later. The demand must be made no later than 21 days before trial, but the court may excuse a late filing in the interest of justice.

The disqualification of a judge is governed by MCR 2.003. MCR 3.912(D). See *In re Schmeltzer,* 175 Mich App 666, 673–74 (1989) (disqualification of trial judge was not warranted, where the judge had presided over termination proceedings involving a younger sibling; evidence of the prior abuse or neglect was admissible at the subsequent trial).*

*See Section 11.9 ("other acts" evidence).

**Referees.** MCR 3.913(B) states that unless a party has demanded a trial by judge or jury, a referee may conduct the trial and further proceedings through the dispositional phase. Thus, if a referee tries a case, that same referee may conduct dispositional hearings, dispositional review hearings, permanency planning hearings, and termination of parental rights hearings even if a respondent later requests that a judge preside at a hearing.*

*See Chapter 15 for a more detailed discussion of referees.